



April 21, 2005

Rhetoric:

“And for people to suggest that you can break the rules to change the rules is 1 un-American. The only way that you can change the rule in this body, a rule that now says to change a rule in the Senate rules; to break a filibuster still requires 67 votes. You can't do it with 60. You certainly can't do it with 51. But now we're told that they, the Majority, are going to do the so-called nuclear option. Come in here and have the Vice President seated where the distinguished Senator is now seated, and the Parliamentarian would acknowledge that it is illegal. They would just overrule it. It would simply be -- well, we're going to do it here because we have more votes than you have. You would be breaking the rules to change the rules.”

-Senator Harry Reid, Senate Floor, 4/21/05

FACT:

Senator Schumer:

Mr. KMIIEC. . . . The real constitutional injury here . . . is the entrenchment of rules being imposed from one body onto the next.

Senator SCHUMER. **Which could be changed by majority vote.**

Mr. KMIIEC. And should be changed by majority vote . . .

Senator SCHUMER. Right. That is why – I do not know why you say ‘imposed,’ because . . . **the 51 Senators of the majority could propose changes in the rules.**

Judicial Nominations, Filibusters, and the Constitution: When a Majority is Denied Its Right to Consent, S. Hrg. 108-227, at 60 (2003).

Democrat supporters outside the Senate:

Lloyd Cutler: “A strong argument can be made that its requirements of . . . a two-thirds vote to amend the rules are . . . unconstitutional.” *The Way to Kill Senate Rule XXII*, Wash. Post, Apr. 19, 1993, at A23.

USC Law Professor **Erwin Chemerinsky:** “Rule XXII is unconstitutional in its requirement that change be approved by two-thirds vote to change the Rule. The effect of declaring this unconstitutional is that the current Senate could change Rule XXII by

majority vote. In other words, a majority of this Senate could eliminate the filibuster if a majority wished to do so.” *The Filibuster*, 49 Stan. L. Rev. 181, 252 (1997).

Senate precedents:

A majority of Senators has always possessed the constitutional power, under Article I, to establish the standing rules of the Senate.

Supporters of such constitutional authority to establish standing rules by a majority vote include Nelson Aldrich (1890), Thomas Walsh (1917), Clinton Anderson (1953 and later), Richard Nixon (1957 and later), **George McGovern** (1967), Frank Church and **Hubert Humphrey** (1969), and James Pearson, **Walter Mondale and Nelson Rockefeller** (1975).

And in **1975**, the Senate voted **three times** (51-42, 48-40, and 46-43) in support of the power of a Senate majority under Article I to change the rules. Those precedents forced the Senate to act and led to a major change in the cloture rule.

A majority of Senators has also always possessed the constitutional power to establish new Senate precedents – including precedents that reverse prior precedents, and precedents that contravene the text of the standing rules of the Senate.

In fact, **Senator Robert Byrd** led the charge to establish **new Senate precedents in 1977, 1979, 1980, and 1987** – including a number of precedents that were designed specifically to stop filibusters and other delay tactics that were previously authorized under Senate rules or prior precedents: